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NO. PD-0035-18
IN THE COURT OF CRIMINAL APPEALS OF TEXAS

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COURT OF CRIMINAL APPEALS
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FREDDY GARCIA
Appellant

v.

THE STATE OF TEXAS
Appellee

On Petition for Discretionary Review of Cause No. 14-16-00242-CR
In the Fourteenth Court of Appeals, Reversing Judgment in Cause Number 0482220
From the 174th District Court of Harris County, Texas
Honorable Ruben Guerrero, Presiding

APPELLANT'S BRIEF ON THE MERITS

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STATEMENT REGARDING ORAL ARGUMENT

The Court has denied oral argument.

STATEMENT OF THE CASE

On August 17, 1987, Freddy Garcia was arrested as he pulled into the apartment complex where he lived. That day, his wife and his stepdaughter, B., reported that he had sexually assaulted B. in her bedroom the previous day, that is, August 16, 1987.

Less than two weeks later, Appellant was indicted for the offense of sexual assault of a child in connection with this incident. The indictment alleged that on or about August 16, 1987, he intentionally and knowingly caused the penetration of the female sexual organ of [B.], the complainant, a person younger than fourteen years of age and not his spouse, by placing his sexual organ in the female sexual organ of the Complainant (CR at 14).

After he was released on bond, Appellant apparently fled the state. The case resumed in 2015, after he was arrested out of state and returned to Texas.

SUMMARY OF THE ARGUMENT

The trial court erred when it denied Appellant's motion for the State to elect, at the close of its case, which of two incidents it intended to submit to the jury. Though the State claimed that the draft jury charge would provide notice of its election, it is axiomatic that a jury charge is not a de facto election. Therefore, the State made no

election at all, even at the close of all the evidence, as the trial court had (erroneously) ordered.

However, whether or not the State made no election, a late election, or, as the Sate would characterize it, a "merely delayed" election, the result is the same. The analysis of the record for error involves a review of what the *trial court* did or failed to do, not what the parties did. The trial court's error in ordering an election at the wrong time is undisputed.

Election error has been analyzed for harm under the same standard for at least 100 years, without any sign that it is unworkable or unreliable. That harm standard now is the constitutional harm standard in Tex. R. App. Proc. 44.2(a). Though the State argues that the non-constitutional harm standard should apply on the facts of this case, the argument incorrectly focuses on the State's conduct and the jury charge, neither of which was raised as a point of error by Appellant. The State has offered no reason to abandon the constitutional harm review for election cases.

Further, because the jury charge was not at issue on appeal, the State's second issue is not raised by the facts of this case. The jury charge was merely one of a number of factors the court of appeals considered when it determined that it could not say, beyond a reasonable doubt, that the trial court's error was harmless. Its careful analysis was based in precedent and took into consideration all of the record before it. The court of appeals' judgment should be affirmed.

RELEVANT FACTS

As the court of appeals noted, this case involves evidence from different witnesses who described two distinct penetrative assaults that occurred under different circumstances, at different times, in different rooms, of different apartments. *See Garcia v. State*, 541 S.W.3d 222 (Tex. App. – Houston [14th Dist.], 2017) (op. on reh'g) (pet. granted). Before trial, Mr. Garcia had notice of only one incident that fit the indictment's description – the assault in the bedroom of their apartment on Hollister on August 16, 1987.

A. The State did not indict Mr. Garcia for the bathroom incident.

The indictment against Appellant alleged a single sexual assault, based on an outcry from the complainant and her mother on August 17, 1987 (CR at 4). They told police that the previous day (that is, on August 16, 1987), the complainant's mother had returned home from an errand unexpectedly early and found Appellant attempting to sexually assault the complainant in a bedroom in the apartment where they all lived. Though neither one said that penetration had occurred, a police officer testified at trial (some 30 years after the arrest) that she thought she recalled the complainant saying there had been penetration (3 RR at 99).

Neither B. nor her mother reported any other assaults to police. Appellant was arrested the same day. There is no evidence that any other assaults of any kind by Appellant against B. were reported before the grand jury handed down the indictment on August 28, 1987 (CR at 11).

This single incident, then, was the only possible offense for which Appellant was indicted. No amended indictment was ever filed to allege any other incident.

B. The State did not include the alleged bathroom incident – the incident actually submitted to the jury – in its notice of extraneous acts.

In its brief, the State creates a false impression that prosecutors gave Appellant notice of the alleged bathroom incident in their extraneous acts notice (*See* State's Brief at p. 26). The notice itself belies this, however (CR at 58).

Appellant moved for notice of extraneous acts and offenses, and the State filed a written response on October 19, 2015 (CR at 38). It listed eight extraneous sexual assault offenses against B, but it did not include a single extraneous sexual assault by penetration of B.'s female sexual organ by Appellant's sexual organ, the specific type sexual assault alleged in the indictment. All of these were alleged to have occurred on or about August 18, 1987. No offenses could have occurred on that date because Appellant was already in jail then, having been arrested on August 17, 1987. Still, the "on or about" language would have encompassed an earlier penetrative assault if it had been included in the notice, but it was not.

This means Appellant did not get notice that he would have to defend against another allegation of penetrative assault, though he was on notice of eight other allegations of other types of sexual assault. Even after receiving the State's notice, he did not know that an additional penetration-by-sexual-organ incident would be offered as an extraneous offense, let alone that it would be the offense submitted to the jury to

determine his guilt or innocence.

C. B. testified during an Art. 38.37 pretrial hearing that Appellant had sexually assaulted her in the bathroom of a different apartment, by penetration.

After the jury was sworn, defense counsel requested a pretrial hearing regarding the alleged extraneous offenses the State intended to offer at trial (3 RR at 6). At a hearing outside the jury's presence, B. testified that Appellant had raped her in their previous apartment on Sherwood Forest, in the bathroom (3 RR at 14). She testified in general terms about other incidents, and then described the incident for which Appellant was indicted – the alleged assault in the bedroom of their apartment on Hollister. This incident was interrupted by her mother, who returned home unexpectedly (3 RR at 17).

D. The trial court erroneously ordered the State to elect at the close of all the evidence. The State compounded this error by failing to do so.

Appellant timely moved, on multiple occasions throughout the trial, for the court to order the State to elect which of the two alleged offenses it intended to submit to the jury. *See, e.g.*, 3 RR at 122. The trial judge erroneously agreed with the State's assertion that an election was not required until the close of all the evidence (4 RR at 69). The State concedes this was error. *See* State's Brief at p. 17, Sect. II.

Once the evidence was closed, however, the State still did not give any notice to the court or Appellant. Then, the next day, the newly-alleged offense (the sexual assault in the bathroom at a different apartment) was described in the jury charge, though the

alleged date remained on or about August 16, 1987, the date for the original offense described in the indictment (the sexual assault or attempt in the bedroom of the last apartment the family lived in together) (CR at 112).

E. The Fourteenth Court of Appeals followed 30 years of precedent and held this was constitutional error, reconsidering and modifying its opinion in light of the newly-released decision in *Owings*.

The court of appeals concluded there was a significant danger that: 1) jurors could merge both offenses to find Appellant guilty; or 2) six jurors could convict on the basis of one alleged incident and six could convict on the basis of the other alleged incident. The court also determined that the error violated Appellant's right to notice of the charge he was to defend against.

The appellate court noted that the dangers were increased by the jury charge, and by closing arguments based on the charge's conflated description of a single penetrative assault occurring both (1) "while inside a bathroom inside an apartment [complainant] . . . shared with her mother, brothers, and the defendant;" *and* (2) "on or about the 16th day of August, 1987" — a date that corresponds to a separate bedroom incident in another apartment. *Garcia*, 541 S.W.3d at 234.

FIRST GROUND OF REVIEW, RESTATED:

Is the constitutional harm standard the proper test for harm when there was a mere delay in the election versus no election at all and the jury is charged on a specific incident?

REPLY: **Late election or no election, the constitutional harm standard is the appropriate framework for deciding whether a trial court's erroneous ruling on a defendant's motion for an election is reversible.**

A. The doctrine of stare decisis stands in opposition to the State's proposed standard of review here.

"We follow the doctrine of *stare decisis* to promote judicial efficiency and consistency, encourage reliance on judicial decisions, and contribute to the integrity of the judicial process. But if we conclude that one of our previous decisions was poorly reasoned or is unworkable, we do not achieve these goals by continuing to follow it." *Paulson v. State*, 28 S.W.3d 570, 571-2 (Tex. Crim. App. 2000).

Until 1997, Texas had only one standard for determining whether trial court error in a criminal case was reversible. It codified in what was former TEX. R. APP. PROC. 81(b)(2): "If the appellate record in a criminal case reveals error in the proceedings below, the appellate court shall reverse the judgment under review, unless the appellate court determines beyond a reasonable doubt that the errors made no contribution to the conviction or to the punishment." *See Harris v. State*, 790 S.W.2d 568, 589 (Tex. Crim. App.1989) (Clinton, J., dissenting).

For almost a century, it has been the law in Texas that the trial court must order the State to make an election of offense at the close of the State's evidence, if a

defendant has timely moved for it. *See Crosslin v. State*, 235 S.W. 905, 90 Tex. Crim. 467 (Tex. Crim. App. 1921) (citing even earlier authority for proposition that State must make an election before defendant is required to introduce his evidence). Appropriately, the State has conceded that it was error for the trial court to deny Appellant's multiple timely motions for the State to elect at the close of its case which offense to present to the jury. *See* State's Brief at 17, sect. II.

The error in this case violated both U.S. and Texas constitutional law, as discussed below. When both types of error occur in a case, this Court applies the standard of harm for constitutional error from TEX. R. APP. PROC. 44.2(a). *See Jasper v. State*, 61 S.W.3d 413, 423 (Tex. Crim. App. 2001).

Rather than urge a wholesale abandonment of the constitutional harm standard for election cases, the State suggests this Court carve out an exception for cases in which: 1) there was a mere delay in the election versus no election at all; and 2) the jury is charged on a specific incident. *See* State's Brief at p. 13, First Ground for Review.

The constitutional harm standard in today's Rule 44.2(a) is the same as the single, uniform harm standard in former Texas Rule 81(b)(2), which it replaced. In September, 1997, when the new rules of appellate procedure took effect, that a less rigorous harm standard began to govern cases involving non-constitutional error. This means that all election cases decided before September 1, 1997, used what is now known as the constitutional harm standard. History does not reveal any particular problem with

applying this standard to election cases over the past 100 years. Nor does this long line of cases suggest that application of it was poorly reasoned in any case, until now.

The Court of Appeals followed long-standing precedent when it reviewed the trial court's error under the constitutional harm standard established in Tex. R. App. Proc. 44.2(a). When a trial court's error violates state or federal constitutional law, the harmless error standard of review applies.

B. Error consists only of trial court action or inaction. The State's proposed substitution of the non-constitutional harm standard based on factors relating to the State's conduct would not provide a harm analysis for the actual error at issue here – the trial court's erroneous denial of Appellant's motion for an election of offense.

"In appellate parlance, *trial court* mistakes are referred to as 'errors,' … which may be reversible, depending on the applicable harm analysis (if any)." *Johnson v. State*, 169 S.W.3d 223, 229 n. 15 (Tex. Crim. App. 2005) (internal citations omitted) (emphasis added). Even if the error here actually involved one or both of the factors suggested by the State for changing the standard of review, however, neither factor is relevant to this appeal.

The error Appellant complained of was not the State's failure or delay in election, and it was not the jury charge, the two factors the State points to in its first issue. Rather, the error was the trial court's legally incorrect ruling that the State did not have to elect between offenses at the close of its case.

It does not matter to the harm analysis when – or even if – the State elected which offense to present to the jury. That is not the error at issue here. As Professors

Dix and Schmolesky explain:

> Error … consists only of trial court action or inaction. Whether error is harmless should focus upon the impact on the defendant of the ***trial court's*** **action or inaction**. Lack of harm to the defendant as a consequence of the matter requiring the trial court to act—as by excluding evidence—is relevant only to whether that matter should require trial court action, and this is not a question of harmless-error law.

George E. Dix & John M. Schmolesky 43A TEX. PRAC., CRIM. PRAC. AND PROC. § 56:168 (3rd ed.) (emphasis added).

"The *parties* do not ordinarily commit error; the *trial court* does, whenever it acts, or fails to act, over the legitimate objection of a party or it conducts trial proceedings in a manner inconsistent with a constitutional or statutory requirement that is not optional with the parties." *Snowden v. State*, 353 S.W.3d 815, 821-22 (Tex. Crim. App. 2011). For this reason, it would be legally unsound to change the reversible error standard because of any particular aspects of a party's conduct, as the State proposes here.

C. The State's proposed exception to the constitutional harm rule is not raised by the facts of this case.

Neither circumstance occurred in this case, however. For that reason alone, the State's argument has no merit.

1. The State did not merely delay its election of offense, it did not make an election at all.

The State's effort to transform the trial court's error into a "mere delay" by the State is not a reason for this Court to create an exception to the rule. In fact, the State

did not merely delay to make an election – it did not elect which offense to submit at all. A jury charge is *not* a de facto election, as this Court reiterated in *Owings v. State*, an election case decided by this Court shortly after the court of appeals' original opinion here, the Court reiterated that a jury charge is *not* a late election. *See Owings v. State*, 541 S.W.3d 144, 150 n. 8 (Tex. Crim. App. 2017). The Court noted that there was no meaningful distinction between a *failure* to elect versus a *late* election.

Disregarding this obvious conclusion, the State goes one step further and claims the jury charge here is an election, but it is not a *late* election; it is a *merely delayed* election. The Court should not indulge this semantic game. The synonyms for "late" are plentiful: merely delayed, postponed, untimely, past-due, tardy, delinquent, overdue – the list goes on and on. Still, substitute any of them for the adjective "late," and the law is still the same: there is no meaningful distinction between a failure to elect and a [merely delayed, untimely, tardy, etc.] election. *See id. See*, *also*, *Phillips v. State*, 193 S.W.3d 904, 912 (2006) ("A jury charge and an election are not interchangeable in this context.").

When the error analysis focuses on the *trial court's* ruling, as it must (*see* Dix & Schmolesky, *infra*), then whatever the State did – or failed to do, or did late – is only relevant to the harm analysis, if it is relevant at all. The State's first issue incorrectly focuses on its own conduct, straining to define it in a way that would make it conform

to the election requirement. Even if this were the error at issue, however, the State is still wrong. Its election was not merely delayed.[1]

2. There was no evidence from which to draw an inference that the State actually made an election.

The State asks this Court to infer from a silent record that it notified Appellant of its election of offense at the close of all the evidence. *See* State's Brief at p. 14. First, no such inference can be drawn on this record. To the contrary – the record explicitly shows the State did *not* give notice of its election. After the parties rested and closed, defense counsel asked the Court for a hearing about the State's election:

> Mr. Horak: If you want to excuse the jury, I have one thing just about the election.
>
> The Court: The what?
>
> Mr. Horak: The election, the State's election issue.
>
> The Court: State's election issue --
>
> Mr. Horak: As to which offense they're moving forward on. Because that's going to play into the jury charge.
>
> The Court: All right. We'll excuse the jury and do that.
>
> [Jury excused.]
>
> The Court: All right. Talk to me about the election.
>
> Y'all may be seated, if you so desire.

[1] The State's argument brings to mind Monty Python's famous "Dead Parrot" sketch: "It's not dead; it's resting." "No, no. It's stunned." "It's probably pining for the fjords." *See* https://www.youtube.com/watch?v=4vuW6tQ0218.

(4 RR at 11). Even then, the State did not inform the judge and the defense which offense it elected to submit to the jury. This directly violated the judge's order, erroneous though it was, requiring the State to make an election at the close of all the evidence. The prosecutor responded:

> Mr. Calligan: Judge, we have some sample language on that election. **We're looking at a sample jury charge right now**. It's just going to be a matter of us figuring out how to word the description of the specific incident we are electing to go forward on.
>
> So, if we could be allowed some time to do that. **I can forward a copy to B J [the court reporter] this afternoon** once we get back to the office, and **we'll forward a copy to you guys as well** so you have a copy of it, too, **to make sure there's no objections** to that.

(4 RR at 111) (emphasis added).[2]

That statement is the exact opposite of evidence that would support an inference of an election. The prosecutor told the trial court very clearly that they were working on the wording of a sample *jury charge*. The charge would describe "the specific incident we are electing to go forward on," he said. He did not give any clue about what that specific incident might be, let alone specifically elect one alleged offense.

Mr. Calligan's use of the phrase "to make sure there's no objections to that" is further proof that he was planning to send a draft jury charge, rather than an election,

[2] The record does not reflect who "you guys" is, but the only people who could make objections were trial counsel, so it is reasonable to assume that it refers to defense counsel.

to defense counsel. The latter does not open the door to any objection; it is the State's own choice. Only the former is subject to objections, and therefore frequently is exchanged in draft form between the parties before submission to the trial court.

All the State ever planned to provide to defense counsel was a draft jury charge. Because a jury charge is not a *de facto* election (*see Owings v. State*, 541 S.W.3d at 150 n. 8), the State made *no* election – not a late election, not a merely delayed election, no election. It would be reasonable to infer from this record that the State sent a draft jury charge to defense counsel; it is not reasonable to infer that the State disclosed the specific incident to the defense any time before that. *Compare Kellar v. State*, 108 S.W.3d 311, 314 (Tex. Crim. App. 2003) (emphasis added). In Kellar, the State had evidence of multiple incidents of theft that were not specified in an indictment alleging conspiracy. A motion to quash the indictment was unsuccessful, and this Court agreed:

> … [A] defendant does have a constitutional right to sufficient notice so as to enable him to prepare a defense. However, this due process requirement may be satisfied by means other than the language in the charging instrument. When a motion to quash is overruled, a defendant suffers no harm unless he did not, in fact, receive notice of the State's theory against which he would have to defend. The record in this case clearly shows that the appellant had actual notice of the **specific instances of theft** upon which the State was basing its allegations. In a series of pretrial hearings, the prosecutor agreed to provide the defense with information related to the individual transactions that were aggregated in the indictment.

Id. In contrast, Appellant had no idea which specific alleged incident of sexual assault by penetration the State intended to submit to the jury. The court of appeals was correct to reject the State's proposed inference that an election occurred.

Second, even if something in the record *could* give rise to an inference that the State made an election, it would not matter to the result in this case. As discussed above, the error here is the *trial court's* failure to order an election at the close of the State's case rather than at the close of all the evidence. Whether the State thereafter made a late election or it did not, the error – the trial court's unconstitutional order – still remains.

3. The trial court did not charge the jury on a specific incident.

The second factor the State offers as part of its proposed exception to the constitutional harm standard is: "The jury is charged on a specific incident." However, the jury charge in this case did *not* charge on a specific incident. The trial court charged the jury with an instruction that conflated the earlier bathroom incident and the separate August 16, 1987 bedroom incident:

> Now, if you unanimously find from the evidence beyond a reasonable doubt that on or about the 16th day of August, 1987, in Harris County, Texas, the defendant, Freddy Garcia, did then and there intentionally or knowingly cause the penetration of the female sexual organ of [B.], a person younger than fourteen years of age and not his spouse, by placing his sexual organ in the female sexual organ of [B.], while inside a bathroom inside an apartment [B.] shared with her mother, brothers, and the defendant, then you will find the defendant guilty of aggravated sexual assault of a child, as charged in the indictment.

(CR at 112). The charge also instructed the jury that the State is not bound by the specific date on which the offense is alleged in the indictment to have been committed.

The jury charge in this case *appeared* to present only one incident as a basis for conviction, but as the court of appeals said, the charge referenced a single penetrative assault that occurred (1) in a bathroom; ***and*** (2) on or about August 16, 1987. *Garcia*,

651 S.W.3d at 233. The record shows that the earlier alleged penetrative assault (in the bathroom of the family's apartment when the complainant was 11 years old) is a separate incident, distinct from the later alleged penetrative assault in the bedroom of a different apartment on August 16, 1987, when the complainant was 12.

The court of appeals concluded: "Because some evidence was presented that penetration may have occurred both in a bathroom and separately on August 16, 1987, in complainant's bedroom, there is a significantly increased possibility that (1) the jury convicted based on a combination of the offenses without believing that the State proved one of those offenses beyond a reasonable doubt; or (2) some members of the jury convicted based on the bathroom incident and others based on the August 16, 1987 bedroom incident. *See Phillips v. State*, 130 S.W.3d 343, 353 (Tex. App.—Houston [14th Dist.] 2004), *aff'd*, 193 S.W.3d 904 (Tex. Crim. App. 2006) (finding constitutional error where "both offenses were described in detail more than once ... yet, it was completely unclear to the jury which act the State would rely upon for conviction"). This significant possibility is made more likely because the jury charge—and the parties' closing arguments based on that charge—conflated these two separate incidents of penetrative assault." *Garcia*, 541 S.W.3d at 234.

D. The trial court's failure to require a timely election violated the due process and due course of law guarantees of the U.S. and Texas Constitutions, and the state constitutional right to a grand jury. The court of appeals was correct to apply the constitutional harm standard of Rule 44.2(a).

Under the Due Process Clause of the Fourteenth Amendment, a defendant has

the right to notice of the charges against him. Notice of a specific charge, and a chance to be heard in a trial of the issues raised by that charge, are among the constitutional rights of every accused in a criminal proceeding in all courts, state or federal. *See Martinez v. State*, 225 S.W.3d 550, 554 (Tex. Crim. App. 2007), quoting *Cole v. Arkansas,* 333 U.S. 196, 201 (1948). "The charge must be known **before the proceedings commence**, and the charges cannot be amended (nor added to), once the proceedings are underway." *Id.* (emphasis added).

The State seems to suggest that notice of the specific charge against a person is such an insignificant matter that its denial does not rise to the level of a constitutional error, as long as the charging instrument is correct. *See* State's Brief at p. 24. However, as Judge Yeary said in *Owings*: "Notice is ordinarily a question of what a defendant knows before trial." *Owings*, 541 S.W.3d at 155 (Yeary, J., concurring). In this case, Appellant knew before trial that he had been indicted for an aggravated sexual assault of a child that allegedly occurred in a bedroom of their last apartment on August 16, 1987. The indictment alleged that he committed the offense by inserting his sexual organ into B.'s female sexual organ on or about August 16, 1987. He was arrested for this offense on August 17, 1987, the day B. and her mother reported the incident to police. A criminal complaint was filed the next day, August 18, 1987 (CR at 11). The indictment, which exactly copied the complaint, followed less than two weeks later, on August 28, 1987 (CR at 14). The State offered no evidence that B. or her mother reported any other incidents of penetration in that time period, or anytime thereafter (3

RR at 154). Therefore, the indictment, which described only one offense must have referred to the single incident reported on August 17, 1987.

Before trial, Appellant had no notice, either in the indictment or in the notice of intent to offer extraneous offenses, that that the State would seek a conviction for an entirely different incident. Then, during a pretrial hearing after the jury had been sworn, B. (who by then was 41 years old) testified that Appellant also had sexually assaulted her by penetrating her vagina with his penis when she first moved in with him and her mother, about a year earlier (3 RR at 19). Nothing in the record indicates that the defense knew of this alleged earlier incident until that hearing.

In 2015, when Appellant had been taken back into custody, defense counsel filed a request for notice of extraneous offenses the State intended to use at trial (CR at 26). The State responded on October 19, 2015 (CR at 58). The response contained ***no*** disclosure that prosecutors would offer evidence of any other penetrative assault of B.'s sexual organ by Appellant's sexual organ. by sexual organ. Appellant was on notice that the State might offer evidence of other types of sexual assaults, but he was not on notice that the State would offer evidence of another incident that amounted to the same offense alleged in the indictment.

Here, Appellant did not learn *until the jury charge* that the jury would be deliberating about an entirely different episode than the one charged in the indictment. Once Appellant became aware that the State would be putting on evidence of two episodes, he began insisting on his due process right to notice by the State's election before time

for him to put on a defense, a right the trial court denied him.

These facts distinguish Appellant's case from *Sledge v. State*, cited by the State in its brief. In *Sledge*, the appellant complained that he was convicted of two unindicted offenses, in violation of TEX. CONST ART. 1 § 10. He argued that because the State had included in its notice of extraneous offenses the two offenses he ultimately was convicted for, they could not have been the indicted offenses. This Court disagreed after comparing the indictment and the notice of extraneous offenses. *Sledge v. State*, 953 S.W.3d 253, 255 (Tex. Crim. App. 1997).

In Appellant's case, the indictment could not have referred to any incident other than the one that was alleged to have occurred on August 16, 1987, because neither B. or her mother reported any other incident before the grand jury handed down the indictment on August 28, 1987. Therefore, the Appellant was convicted in violation of TEX. CONST. ART. 1 § 10: "no person shall be held to answer for a criminal offense, unless on an indictment of a grand jury …"

Further, Appellant's conviction for the unindicted offense amounted to an implied amendment to the indictment. This is a second way Appellant's conviction violated Art. 1 § 10. *See Flowers v. State,* 815 S.W.2d 724, 729 (Tex.Crim.App.1991): "[If] the record shows that the amendment is made so as to charge **a different occurrence or incident** than that originally alleged in the indictment, the substantial rights of a defendant would be prejudiced in part because he has been denied any grand jury review of the offense as required by Art. I § 10." (emphasis added).

The State concedes the trial court's ruling was error. What remains is a review for harm, and the broader question: should the constitutional harm standard apply to election error on the facts of this case?

E. The trial court's error was constitutional error. Constitutional error (other than structural error) demands a constitutional harm analysis.

"When the error in question is constitutional, an appellate court **must** reverse a judgment of conviction or punishment unless the court determines beyond a reasonable doubt that the error did not contribute to the conviction or punishment. TEX. R. APP. PROC. 44.2(a)." *Love v. State*, 543 S.W.3d 835, 846 (Tex. Crim. App. 2016).

To summarize, the trial court's error in this case violated:

1) the Due Process Clause of U.S. Const. amend. XIV;

2) the Due Course of Law Clause of Tex. Const. art. 1 § 19; and

3) the guarantee of indictment by a grand jury in Tex. Const. art. 1 § 10.

It follows, then, that the constitutional harm standard applies.

The Supreme Court has said, on more than one occasion, that "real notice of the true nature of the charge against [a defendant is] the first and most universally recognized requirement of due process." *See, e.g.*, *Marshall v. Lonberger*, 459 U.S. 422, 436 (1983). The State, however, would reduce this requirement, embedded in the Constitution's Bill of Rights, to little more than a footnote.

The State argues that when the error "boils down to the issue of notice," reviewing courts should use the standard of review for non-constitutional error, TEX.

R. APP. PROC. 44.2(b). *See* State's Brief at p. 24 (citing Judge Yeary's concurrence in *Owings*). The State also relies on a 1998 case that also is styled *Garcia v. State*, 981 S.W.2d 638 (Tex. Crim. App. 1998). In the earlier *Garcia*, this Court held that an indictment's "on or about" language does not amount to error, constitutional or otherwise. *Id.* at 686.

The State's reliance on the earlier *Garcia* here (unlike Judge Yeary's citation of it in his *Owings* concurrence) may be based on a misinterpretation of the court of appeals' opinion below. The lower court did not find any error in the *indictment's* use of "on or about" language, nor did Appellant raise it as a point of error.

Rather, when it came to its harm analysis, the court of appeals found that conflating the descriptions of the two alleged incidents, one indicted and one not, could have mislead the jury or resulted in a non-unanimous verdict. *See Garcia*, 541 S.W.3d at 233. The court referred to the "on or about" language *in the jury charge* (not the indictment) as an additional circumstance that increased the likelihood that the error was harmful. This was part of the lower court's harm analysis, not a discussion of whether "on or about" language in the indictment was erroneous.

Here, unlike any other case cited by the State:

1) Appellant had no notice in the indictment that the State would submit and entirely different incident to the jury for it to decide whether he was guilty of aggravated sexual assault of a child;

2) Appellant had no notice from the State's notice of its intent to offer evidence of extraneous offenses that he would have to defend

against allegations about a penetrative assault that different witnesses said occurred on a different date, in a different place; and

3) Appellant had no notice from the State's evidence during the trial that the State would choose the newly-disclosed offense, not the indicted offense, to submit to the jury.

Whatever knowledge may be attributed to Appellant regarding other incidents that occurred prior to the date alleged in the indictment, the due process and due course of law issues here "boil down" to the fact that Appellant received **no** notice – not before trial, and not even during the State's case in chief – that he could be convicted for an incident for which he was not indicted.

This raises a constitutional error that the State does not address, though its citation of *Sledge* does raise it: the fact that the incident submitted to the jury (the so-called bathroom incident) was not the incident for which Appellant was indicted. *See Sledge*, 953 S.W.3d 253, 254. Even if it could be argued that no due process or due course of law violation occurred here, the case still is one of constitutional error under TEX. CONST. ART. 1 § 10, because Appellant was denied his right to be put to trial upon an indictment by a grand jury.

If, then, the issues here are a mix of constitutional and non-constitutional error, review under Tex. R. App. Proc. 44.2(a) is the appropriate standard. *See Jasper*, 61 S.W.3d at 423. The court of appeals correctly applied a constitutional harm analysis to the trial court's error.

F. The State offers no reason for the Court to revisit election error yet again.

In a series of cases over a 30-year period, this Court has consistently held that the absence of a timely election is constitutional error. In some cases, the Court has held the error harmless beyond a reasonable doubt; in others, the Court has held that the facts create a reasonable doubt about whether the error is harmless. In either circumstance, what constitutes error has not changed. The cases can be summarized as follows:

1. If a defendant makes a timely request, the trial court must order the State to elect the offense it intends to submit to the jury, no later than the close of the State's case. *See O'Neal v. State*, 746 S.W.2d 769, 772 (Tex. Crim. App. 1988);

2. The failure to require the State to elect upon timely request results in constitutional error. *See Phillips v. State*, 193 S.W.3d 904, 914 (Tex. Crim. App. 2006);

3. A jury charge is not a substitute for an election. *Phillips*, 193 S.W.3d at 912.

4. Election error is harmless beyond a reasonable doubt when a jury could not have been confused when deciding the defendant's guilt on one of 100 identical offenses. *See Dixon v. State*, 201 S.W.3d 731, 236 (Tex. Crim. App. 2006); and

5. "There is no meaningful distinction to be drawn on this record between a failure to elect versus a late election. The State posits a 'late election' that occurred in the jury charge. But 'the jury charge does not serve 'as a *de facto* election' because it is given too late in the trial to afford a defendant the requisite notice to defend.' " *Owings v. State*, __ S.W.3d __, 2017 WL 4973823, at *5 n.8 (Tex. Crim. App. Nov. 1, 2017) (citation omitted).

In this case, the court of appeals took great care to analyze the record and this Court's numerous precedents to reach the result the State complains of here. The lower court considered and applied each of the above cases to conduct its analysis. "In applying the "harmless error" test, we ask whether there is a "reasonable possibility" that the error might have contributed to the conviction." *Love*, 543 S.W.3d at 846.

The court of appeals reviewed the entire record and concluded that it could not say, beyond a reasonable doubt, that the trial court's error was harmless. "At bottom, an analysis for whether a particular constitutional error is harmless should take into account any and every circumstance apparent in the record that logically informs an appellate determination whether 'beyond a reasonable doubt [that particular] error did not contribute to the conviction or punishment.' " *Snowden*, 353 S.W.3d at 821-22.

The constitutional harm standard's use in election cases has withstood the test of time. When, as in this case, all the issues are constitutional ones, it would be contrary to the principles and rationale of the stare decisis doctrine to change that standard now.

G. The court of appeals applied this well-established body of law to the record before it and concluded, as this Court did in *Phillips*, that the constitutional error was not harmless beyond a reasonable doubt.

The court of appeals considered each of the cases cited above before concluding the election error in this case was harmful. In fact, when *Owings* was handed down after

the court of appeals' original opinion, the lower court withdrew that opinion and reconsidered Appellant's case in light of *Owings*. *See Garcia*, 2017 WL 6374691 at *11. The result, as it turned out, remained the same. The court concluded that "harmful error is shown because the circumstances here are much more similar to those in *Phillips* than they are to those in *Owings* or *Dixon*." *Id.* at *12.

The State argues Appellant suffered no harm because his defense was a blanket denial. This simply is not true. Appellant *did* prepare a thorough defense to the incident alleged in indictment – the only incident he had notice of before trial. There was evidence that police had taken a pair of B.'s panties to the crime lab to be analyzed for the presence of semen. While semen purportedly was found, the lab did not conduct a DNA test to see if it was connected to Appellant. Later, the panties were destroyed. Defense counsel presented one of the lab analysts as a defense witness to testify about the destruction of evidence. He then used that to vigorously argue that the State had not met its burden of proof to establish that Appellant was guilty beyond a reasonable doubt. 4 RR at 72. He also called two of Appellant's other children to testify about their father's character. 4 RR at 92. This is far more than any "blanket denial."

However, the complete lack of notice before trial left the defense unable to respond to B.'s surprise disclosure that she had been sexually assaulted by penetration about a year earlier, in the bathroom of another apartment. This meant that Appellant had no new or different defense to offer against the incident the State ultimately submitted to the jury. It is almost ironic that, having created this barrier to a defendant's

ability to prepare a defense, the State now points to his lack of a defense as a matter for the Court to consider against Appellant's appeal.

The court of appeals decided that because of the State's failure to elect which act it was relying upon for a conviction, it was possible that the jury convicted appellant by combining the bathroom incident and the August 16, 1987 bedroom incident to overcome reasonable doubt. *Id.* at *8. Likewise, it was possible that some members of the jury convicted based on the bathroom incident, and others convicted based on the August 16, 1987 bedroom incident. *Id.* at *12.

Further, the court decided, as a result of the State's failure to make an election, appellant did not have adequate notice of which act the State would rely upon in time to present his defense, and was therefore required to defend against both potential offenses. This last violation was somewhat moderated by appellant's outright denial of any wrongdoing, but that did not excuse the State's failure to elect, according to the lower court. Ultimately, the appellate court determined: "… we cannot say beyond a reasonable doubt that the trial court's error in failing to require the State to elect did not contribute to appellant's conviction." *Id.* at *9. This Court should affirm the court of appeals' judgment.

Either a trial court orders an election to be made at the close of the State's case, or it does not. If, after a timely request by the defendant, it does not, then there is constitutional error. What remains is an analysis to determine whether that error was harmless beyond a reasonable doubt. *See* TEX. R. APP. PROC. 44.2(a).

SECOND GROUND OF REVIEW, RESTATED: How specific must the factual rendition of a single incident in the jury charge be to serve the purposes of the election requirement?

REPLY: The court of appeals did not review the jury charge language for specificity, nor did Appellant make it an issue on appeal. The State's second ground of review is not raised by the facts of this case.

Contrary to the State's suggestion, the court of appeals did not find error in the indictment's – and the jury charge's – use of "on or about" language. Appellant did not challenge this language below, and the appellate court here did not address it as a ground of error. Rather, in conducting its harm analysis, the court of appeals considered the confusing jury charge and closing arguments as part of its review in light of the four underlying purposes for the election rule, as instructed by this Court. *See Owings*, 2017 WL 4973823 at *5. Three of those factors weighed in favor of reversal, the court held.

The court's discussion of the confusion created by the jury charge and closing arguments arose as part of its consideration of the second and third harm factors:

> (2) to minimize the risk that the jury might choose to convict not because one or more crimes were proved beyond a reasonable doubt, and
>
> (3) to ensure a unanimous verdict as to one specific incident which constituted the offense charged in the indictment.

First, the court ruled that there was at least some evidence of two separate penetrative sexual assaults: (1) the bathroom incident; and (2) the August 16, 1987 bedroom incident. Because the evidence was presented from different sources, there was an increased likelihood that the jury added up different events and testimony from

different witnesses in rendering its verdict, it concluded. *Garcia*, 541 S.W.3d at 243.

Then, the court pointed out additional circumstances that further increased the likelihood that the election error "thwarted the purposes underlying the second and third *Dixon* factors." *Id.* at *8. Specifically, the court noted that the jury charge both: (1) conflated the two distinct incidents in its description; and (2) instructed that the jury was not bound by the specific date alleged in the indictment. The court also noted that the closing arguments also conflated the two alleged incidents and did not clear up the confusion. *Id.*

This opinion neither strays from precedent nor attempts to create new precedent. In fact, the lower court compared the facts here to those in *Phillips*, *Dixon*, and *Owings* for guidance. It specifically based its holding on *Phillips v. State*, 130 S.W.3d 343, 353 (Tex. App.—Houston [14th Dist.] 2004), *aff'd*, 193 S.W.3d 904 (Tex. Crim. App. 2006). It found the facts of this case much more analogous to *Phillips* than to *Owings* or *Dixon*, and so reversed Appellant's conviction. On this record, the Court need not visit the issue of election error yet again.

PRAYER

Appellant respectfully requests this Court to affirm the court of appeals' judgment.

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CERTIFICATE OF SERVICE

I certify that a copy of this reply was served electronically on the Harris County District Attorney's Office and the State Prosecuting Attorney on July 2, 2018.

/s/ Cheri Duncan

CHERI DUNCAN

CERTIFICATE OF COMPLIANCE

I certify that this reply complies with Rule 9.2, TEX. R. APP. PROC. It was prepared on a computer using 14-point Garamond type. It contains 7,727 words, counted according to the rule.

/s/ Cheri Duncan

CHERI DUNCAN